Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DAVID ISADOR PORT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER TRIAL COUNSEL'S UNILATERAL DECISION TO ABANDON PETITIONER'S ONLY VIABLE DEFENSE AT THE GUILT/INNOCENCE STAGE OF THE TRIAL AND THE PUNISHMENT STAGE OF THE TRIAL VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PUNISHMENT STAGES OF HIS TRIAL?

INTERESTED PARTIES

1. David Isador Port, Petitioner.
2. John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, Respondent.

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OPINIONS BELOW

Petitioner was indicted on September 28, 1984, for the murder of Debora Schatz. Petitioner was convicted of the offense in March 1995, and a jury assessed his punishment at 75 years confinement in the Texas Department of Corrections. Petitioner timely appealed his conviction to the Texas Court of Appeals. The Texas Court of Appeals initially reversed Petitioner's conviction due to the improper admission of certain inculpatory statements made by Petitioner. *Port v. State*, 736 S.W.2d 865, 866-68 (Tex. App. – Austin 1987). In light of new authority from the Texas Court of Criminal Appeals bearing on the admissibility of Petitioner's oral statements, the Court of Appeals modified its opinion on rehearing. *Port v. State*, 738 S.W.2d 787 (Tex. App. – Austin 1987). In spite of the new authority, the Court of Appeals' ultimate position that Petitioner's oral statements were inadmissible remained unchanged. *Id.* at 791.

The Texas Court of Criminal Appeals granted the State's petition for discretionary review. On petition for discretionary review, the Court of Criminal Appeals held that the oral statements were properly admissible under Article 38.22, Texas Code of Criminal Procedure. Accordingly, the Court of Criminal Appeals reversed the decision of the Court of Appeals and remanded the case to the Court of Appeals for resolution of previously unaddressed points of error contained in Petitioner's appellate brief. *Port v. State*, 791 S.W.2d 103 (Tex. Crim. App. 1990). On remand, the Court of Appeals affirmed the conviction. *Port v. State*, 798 S.W.2d 839 (Tex. App. – Austin 1990).

On March 26, 1997, Petitioner filed his first and only state application for writ of habeas corpus in the trial court, the 207th Judicial District Court of Comal County, Texas, presided over by the Honorable Judge Jack Robison. Petitioner raised, inter alia, the claim that his trial counsel was ineffective for failing to investigate and present the only viable defense at the guilt/innocence stage of the trial and at punishment. A hearing was held on those claims by the trial court on August 28-29, 1997. Petitioner and the State submitted Proposed Findings of Fact and Conclusions of Law to the trial court based on the record and the hearing testimony. The trial court adopted the State's Proposed Findings and Conclusions, by signing them on June 3, 1998, and sent the case up to the Court of Criminal Appeals. On September 16, 1998, the Court of Criminal Appeals issued a "white card"[1] denial of relief, which was postmarked and mailed to the undersigned on September 23, 1998. *See* **Exhibit A**.

JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Article 11.07, TEX. CODE OF CRIM. PROC. This Court has certiorari jurisdiction under 28 U.S.C. § 1257 (1998).

[1] A postcard was mailed to the undersigned stating, in full: "This is to advise that the Court has denied [sic] without written order on the findings of the trial court after a hearing [sic] the application for writ of habeas corpus."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's trial counsel, Mr. Jack Zimmermann, was retained on or about June 8, 1984, shortly after Petitioner was arrested. When he was retained, he was immediately apprised of Petitioner's medical condition: Petitioner was (and still is) a diabetic. Mr. Zimmermann immediately retained an expert, Dr. Milton Altschuler, who examined Petitioner, and who reported to trial counsel that in his opinion, Petitioner was in a hypoglycemic state on the day of the murder.

The fact that Petitioner was a diabetic was actually known to the police even before Mr. Zimmermann was retained. Indeed, during the morning of June 8, 1984, at some point prior to 10:30 to 11:00 a.m., 5 S.F. 45, Bernard Port notified Sgt. David Collier of the Houston Police Department that Port's son, Petitioner, was missing and was a diabetic. 5 S.F. 13. Additionally, on the morning of

June 8, 1984, Mrs. Odette Port told Houston Police Department Officer Irma Lares-Sauceda that Petitioner was a diabetic and needed daily injections of insulin. 6 S.F. 187.

When Petitioner was arrested at approximately 2:15 p.m. on June 8, 1984, he was given his *Miranda* warnings by Officer Harris of the Houston Police Department. 5 S.F. 130-31. After Petitioner was given his *Miranda* warnings, Houston Police Department Officer Mike Waltmon asked Petitioner if he killed the female postal carrier. Petitioner responded, "Yeah, I shot her." 5 S.F. 134. Officer Waltmon then asked him why he shot her and Petitioner responded, "**I don't know; I had a *seizure* or something.**" 5 S.F. 135. Waltmon, who already knew that Petitioner was a diabetic, asked Petitioner if he had taken his dosage of insulin for that day and Petitioner told him he "had a shot at the house" and that he was okay. 5 S.F. 135, 170-71.

Thus, early on, both sides knew that Petitioner's diabetic condition was a potential issue. It was clearly a potential issue to the State, because: (1) Assistant District Attorney Brad Beers discussed Officer Waltmon's modification of his report (striking out "seizure" and inserting "coma") with Officer Waltmon in September 1984, prior to the grand jury's return of the indictment (as discussed in footnote 2, *supra*); (2) the State attempted to obtain the records of Dr. Milton Altschuler, the defensive expert, on September 28, 1984, which was the date that the grand jury returned the indictment; and (3) the State conducted voir dire examination on the topic of diabetes as a potential defense.

Petitioner's trial counsel did some investigation into the ramifications of Petitioner's diabetic condition, as it impacted upon the events of June 7, 1984. Trial counsel also talked to experts and had them available to present a defense. **However, that defense was never presented due to the unilateral decision of trial counsel.** Petitioner was not allowed any input by his trial counsel as to whether the defense should be presented at the guilt stage. *See* E.H. 319, 322. Furthermore, trial counsel failed to use Petitioner's diabetic condition or hypoglycemia as a mitigating factor at the punishment stage of the trial.

Petitioner's diabetic condition was (and still is) the result of a deficiency of insulin in the body. LEO P. KRALL & RICHARD S. BEASER, JOSLIN DIABETES MANUAL 2 (12th ed. 1989) (hereinafter JOSLIN DIABETES MANUAL). Petitioner is a Type 1 diabetic, which means that Petitioner is dependent upon insulin injections because his body does not produce insulin at all or produces it at a greatly reduced level. *Id.* at 15. An acute complication of diabetes is a hypoglycemic reaction which occurs when there is too little glucose in the body. *See* I.J. Deary, *Effects Of Hypoglycemia On Cognitive Function, in* HYPOGLYCEMIA AND DIABETES 80 (Brian Frier & Miles Fisher eds., 1993). Typically this reaction occurs when the diabetic has taken too much insulin, has eaten too little, exercised too much, or some combination of these factors. JOSLIN DIABETES MANUAL, *supra*, at 247. A wide variety of mental changes are displayed during hypoglycemia, ranging from mild anxiety or exhilaration to severe psychotic states. David Adlersberg & Henry Dolger, *Medico-Legal Problems Of Hypoglycemic Reactions In Diabetes* 12 ANNALS OF INTERNAL MEDICINE 1804, 1805 (1939). According to Krall and Beaser,

"In some people, hypoglycemia can cause a Jekyll-and-Hyde effect. The quiet person may become belligerent, or the lively person somber." JOSLIN DIABETES MANUAL, *supra*, at 249. Furthermore, the details of events occurring during hypoglycemic attacks – about which the sufferer may be amnesiac – may subsequently be recalled during other hypoglycemic episodes or merely after a restorative meal. Joseph Wilder, *Problems of Criminal Psychology Related to Hypoglycemic States*, 1 JOURNAL OF CRIMINAL PSYCHOPATHOLOGY 219, 227 (Jan. 1940).

Striking acts of violence and aggressiveness can occur during a state of hypoglycemia. For example, Adlersberg and Dolger describe one of their patients as a devoted mother who, while in a hypoglycemic state, stuck a pin in her infant son's eye several times, then abused and strangled him until her family intervened to save the child. Adlersberg & Dolger, *supra*, at 1807; *see also* Diana Brahams, *Hypoglycemia and Intent*, 337 THE LANCET 1030 (April 27, 1991) (reporting appellate reversal for trial court refusal to allow hypoglycemia defense in assault case). In the British case of *Regina v. Quick*, the Court held that the defense of automatism[2] was available

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[2] The British "defense" of automatism relates to the same concern as TEX. PENAL CODE, § 6.01(a): that an offense must be voluntary. "[T]he accused has a defence known as automatism if he can show that at the relevant time he was in such a condition that he could not be said to have been acting (or acting in a voluntary manner) at all. It is not clear whether the defence of automatism negatives the *mens rea* or the *actus reus* aspects of the offence but it is clear that where the defence is raised successfully no criminal responsibility exists and will result in an outright acquittal of the accused." Gerry Maher, Judith Pearson, & Brian M. Frier, *Diabetes Mellitus and Criminal*

to a hypoglycemic defendant who had taken his insulin shot, but had consumed only a cup of tea, before assaulting the rival for his girlfriend's affections with an iron bar. 1973 Q.B. 910 (Eng. C.A.).[3]

Petitioner's trial counsel failed to adduce, during either stage of the trial, any meaningful evidence of Petitioner's diabetes and, more importantly, evidence of hypoglycemia that occurred on June 7, 1984. Throughout a pretrial suppression hearing, the State made efforts to undercut any possible defense premised upon Petitioner's diabetic condition. *See e.g.*, 5 S.F. 98-99, 134-35; 6 S.F. 187-88, 214-16, 241, 264-65. During the cross-examination of the State's witnesses in the suppression hearing, trial counsel did not even attempt to explore the issue of Petitioner's diabetes and his condition on the day of the death of Schatz or on the following day when he made extensive oral statements after his arrest. During the guilt stage of the trial, trial counsel mentioned that Petitioner had suffered from diabetes since childhood. However, no attempt was made to utilize hypoglycemia to show Petitioner's alleged acts would have been involuntary or to

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Responsibility, 24-2 MED. SCI. LAW 95, 95 (1984); *see also Paredes v. State*, 500 S.W.2d 160 (Tex. Crim. App. 1973) (recognizing an affirmative defense of "diabetes"); *Loftin v. State*, 366 S.W.2d 940 (Tex. Crim. App. 1963) (recognizing entitlement to instruction on diabetes).

[3] Hill and Sargant also describe the case of a young man who was suffering from hypoglycemia when he killed his mother by stabbing her with a kitchen knife. Dennis Hill & William Sargant, *A Case of Matricide*, 244 THE LANCET 526 (Apr. 24, 1943). Brahams, *supra*, reports a 1991 case of repeated hammer attack by a man on his spouse under a possible hypoglycemic rage.

disprove the mental state required for the charged offense of murder. At the punishment stage of the trial, trial counsel elicited from the two defense witnesses that Petitioner had diabetes. 14 S.F. 8, 13, 18, 25-27. On cross-examination, the prosecutor took the offensive and, appearing more knowledgeable on the subject of diabetes than trial counsel, successfully deflated the issue. *Id.* at 31-33. Trial counsel's very brief final argument at punishment, which amounted to no more than a plea for mercy, was wholly unrelated to diabetes or hypoglycemia. 14 S.F. 51. Throughout the trial, the State seemed far more concerned with the issue of diabetes. In fact, the State urged the jury not to consider Petitioner's diabetes to be a mitigating factor. 14 S.F. 71.

SUMMARY OF THE ARGUMENT

Petitioner had only one true, viable factual defense at guilt/innocence and at punishment: that his conduct was the result of hypoglycemia. Petitioner's trial counsel failed to fully investigate and made a unilateral decision not to present that defense at either stage of the trial, electing instead to argue that Roger Port, Petitioner's brother, might have been the murderer, even though he knew that such a defense was untrue and not viable. At punishment, Petitioner's trial counsel repeated the error of his way by again failing to present evidence of the hypoglycemia. The failure to fully investigate and present the true defense, indeed, the only viable defense, constitutes ineffective assistance of counsel. Moreover, the trial court's findings of fact and the "white card" affirmance by the Texas Court of Criminal Appeals conflict with the

Eleventh Circuit's opinion in *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998).

REASONS FOR GRANTING THE PETITION

The Sixth Amendment to the Constitution of the United States, as applicable to Texas via the Fourteenth Amendment, requires that a criminal defendant be afforded effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "The right to effective assistance," the Supreme Court noted in *Cronic*, "is the right to require the prosecution's case to survive the crucible of meaningful adversary testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984); *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (holding that failure to put on punishment evidence of petitioner's hypoglycemic state at the time of offense precipitated a "breakdown in the adversarial process"). Ineffective assistance of counsel mandates reversal of a conviction. *Stone v. Powell*, 428 U.S. 465, 497 (1976). To demonstrate ineffective assistance of counsel, a defendant must show that: (1) trial counsel was deficient; and (2) the defendant was prejudiced by his counsel's performance. *Strickland*, 466 U.S. at 688-92. Under the *Strickland* performance prong, the proper standard for measuring attorney performance is that of reasonably effective assistance as guided by prevailing professional norms. *Strickland*, 466 U.S. at 687-88. "The question of whether a decision by counsel was a tactical one is a question of fact." *Collier*, 1998 WL 646744, at *13 (citations omitted). "Whether the tactic was reasonable, however, is a question of law and is reviewed de novo." *Id.* (citation omitted). Prejudice is

shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

A. DEFICIENT PERFORMANCE OF TRIAL COUNSEL.

As a first step in avoiding deficient performance, trial counsel must acquaint himself with the law and facts of the case. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. A "strategic choice" made after either no legal or no factual investigation, or after the point in time in a trial in which the reasonable choice could have been made, is not a strategic choice at all, but a situation more akin to complete deprivation of counsel, a breakdown in the adversarial system.

Trial counsel failed to provide acceptable performance because he did not make a reasonable investigation of the law and facts in this case. Counsel did investigate Petitioner's diabetic condition. However, he did not research the law on how that evidence could be used at trial. Trial counsel's files were devoid of legal authority relating to the use of hypoglycemia such as those cases cited herein. Nor was there research or legal memoranda on analogous topics relating to, for example, mental capacity to form the requisite mental state to commit murder. Trial counsel did prepare a proposed

jury instruction on voluntariness, which indicates he might have been aware that he could introduce hypoglycemia as an element of Petitioner's defense, but he abandoned such an approach, failing to submit both the evidence and the instruction.

Trial counsel's decision to forego legal research related to Petitioner's condition defies any reasonable professional judgment. *Strickland*, 466 U.S. at 690-91. Research into the law as well as the facts is necessary to make an intelligent tactical decision whether or not to pursue a certain line of defense. Trial counsel's abandonment of any defense based upon Petitioner's mental state was not an informed strategic choice, because he made no effort to educate himself concerning possible legal defenses based upon hypoglycemic states. Failure to research, in itself, was deficient performance exacerbated by the fact that such research, had it been performed, would have disclosed viable legal defenses, whereas trial counsel otherwise had none. *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990); *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). At the state writ hearing, trial counsel alleged that he was planning to use the hypoglycemia defense on the basis of certain contingencies. If counsel made the choices he alleges, they were not informed strategic choices, and they were made well after counsel had elicited testimony, impossibly suggesting an alternative suspect that, by trial counsel's present accounting, foreclosed the opportunity for him to introduce the hypoglycemia evidence at the punishment stage.[4]

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[4] On March 9, 1995, three or four days before the time that Mr. Zimmermann has alleged that he had sufficient information

B. GUILT STAGE INEFFECTIVENESS.

Hypoglycemia could certainly have been used to establish valid defenses to the charge of murder. Trial counsel could have alleged without admitting guilt that, due to insulin shock, Petitioner's actions were not "voluntary acts," as required for any level of criminal culpability under TEX. PENAL CODE, § 6.01(a).[5] Also without

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on the law to make his decision not to put on the hypoglycemia defense, Mr. Zimmermann elicited testimony from Officer Collier that committed Petitioner before the jury to the theory that someone else committed the crime. Mr. Zimmermann has testified that, because of this suggestion to the jury that there was an alternative suspect, he decided not to put on evidence of hypoglycemia at the punishment stage, fearing a backlash from the jury for putting on an (inauthentic) alternative suspect "defense" at the guilt/innocence stage.

The alternative suspect "defense" was objectively unprofessional. Zimmermann provided ineffective assistance of counsel by trying to create suspicion, on the basis of zero factual support, that Petitioner's brother committed the crime. He compounded that error – which cost him credibility with the jury – by cornering himself with that testimony into a situation in which he did not feel like he could put on the only real (hypoglycemia) defense at guilt or punishment.

[5] Section 6.01(a) provides:

> A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.

Voluntary conduct is thus a presumed element of every offense codified in the Texas Penal Code. In order for a conviction to withstand constitutional scrutiny, a defendant must necessarily be convicted of every element of an offense beyond a reasonable doubt. The fact that insulin shock was never raised to demonstrate that Applicant's alleged actions were involuntary raises constitutional questions about his conviction.

an admission of guilt, trial counsel could have raised hypoglycemia as evidence that Petitioner did not possess the required mental state for murder. *See People v. Morton*, 498 N.Y.S.2d 874, 876 (N.Y. App. Div. 1986); *see also Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (punishment phase ineffectiveness for failure to raise hypoglycemia as strongest mitigating evidence). Trial counsel's failure to adduce this defensive evidence on behalf of his client rendered his performance deficient.

By way of analogy, Petitioner directs the Court's attention to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). In *Profitt*, the Fifth Circuit found that trial counsel was ineffective for failing to raise an insanity defense. *Id.* at 1248-50. In attempting to determine whether trial counsel in *Profitt* should have presented an insanity defense the Fifth Circuit proposed a three part inquiry finding performance deficient when counsel:

> (1) makes some exploration of the insanity defense but fails to take an obvious and readily available investigatory step which would have made the defense viable, (2) does not produce reasonable tactical reasons for not pursuing further investigation, and (3) raises no other plausible defense. . . .

Id. at 1248 (citing *Walker v. Mitchell*, 587 F. Supp. 1432, 1443 (E.D. Va. 1984)). Weighing heavily in the Fifth Circuit's finding in *Profitt* that there was deficient performance was the fact that trial counsel's investigative neglect and spur-of-the-moment abandonment of a mental state defense posing the only reasonable defensive strategy left "the client totally defenseless." *Id.* at 1249.

In precisely the same manner as in *Profitt*, Petitioner's trial counsel decided to forego presenting Petitioner's hypoglycemia as a defense. Trial counsel did conduct some preliminary exploration of the issue, with **very positive results**, when Dr. Altschuler's report clearly supported the presentation of the defense. Trial counsel conferred with an additional expert, Dr. Fields, and the notes of that conversation again support the proposition that the defense was viable. Instead of researching the matter and developing and presenting a coherent legal and factual defense, trial counsel abruptly changed course in the midst of trial, on March 9, 1985, and proceeded on the totally implausible theory that someone else (Roger Port) shot the deceased. This approach, derided by the State in closing argument as a "phantom murderer" theory (13 S.F. 1504), was illogical, not only because of inculpatory statements made by Petitioner that were admitted at his trial, but also because of the prodigious amount of circumstantial evidence corroborating those statements and linking Petitioner to the crime. Hypoglycemia, on the other hand – like the insanity issue in *Profitt* – was the only viable, believable, factual defensive evidence that could have been mustered to combat the offense charged.

There is a reasonable probability that, but for trial counsel's failure to investigate and present a defense based upon evidence of Petitioner's hypoglycemic state at the time of the offense, the result of Petitioner's guilt stage would have been different in that Petitioner would have been convicted of a lesser included offense, if not absolved of guilt. *Strickland*, 466 U.S. at 694. The State presented nothing tending to cast in any different light

the clear picture conveyed by the totality of evidence at trial that David Port was a decent, law-abiding youth who, for no ascertainable motive, might have snapped and committed a horrible act. The State is not required to prove motive, and offered no testimony or even convincing cross-examination to counter defense witnesses' favorable opinion of Petitioner and evidence of his good reputation. 13 S.F. 1361-62, 1364, 1372-74 (guilt stage testimony of Michael Buckingham); 13 S.F. 1377-82 (guilt stage testimony of Ann Buckingham). In light of the uncontrovertible evidence of good reputation, the jury had to be very puzzled at the close of the guilt stage testimony by the facts of the offense: an unfathomable and tragic burst of deadly behavior unquestionably perpetrated by Petitioner.

Had trial counsel proceeded at the guilt stage with evidence showing that Petitioner was in a hypoglycemic state at the time of the alleged acts, the jury's puzzlement would have been assuaged, with the likely outcome that the jury would have acquitted Petitioner or convicted him of a lesser included offense. At the time of the offense, when the defense raised sufficient evidence of involuntariness, Texas courts were required to instruct the jury that "a defendant should be acquitted if there is a reasonable doubt as to whether he voluntarily engaged in the conduct of which he is accused." *Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982); *Webb*, 747 F.2d at 283-84. If a homicide was found by the jury not to be "the result of voluntary conduct, it [could] not be criminally punished." *Webb*, 747 F.2d at 283. Evidence of Petitioner's hypoglycemic state would have been admissible not only to disprove voluntariness, but to undermine the State's

proof of essential elements of the offense with evidence of diminished capacity. *Penry v. State*, 903 S.W.2d 715, 769 n.1 (Tex. Crim. App. 1995) (Maloney, J., concurring). Petitioner's hypoglycemic rage could have been marshalled to demonstrate absence of the *mens rea* the State had the burden to prove without raising the affirmative defense of insanity. *Id.* Diminished capacity simply negates the required state of mind that must be proven as an element of the offense charged. *Id.* at 769 n.3.

At the time of trial, Texas recognized a defendant's right to raise diminished capacity in order to negate the mental state element in "specific intent" crimes. *Cowles v. State*, 510 S.W.2d 608, 610 (Tex. Crim. App. 1974); *see Penry*, 903 S.W.2d at 768 (Maloney, J., concurring). The trial court would have been required under *Cowles* to admit Petitioner's evidence of hypoglycemia as proof of diminished capacity, because Petitioner's indictment and charge required a finding of specific intent. The State, at a minimum, was required under Section 19.02(a)(2), Texas Penal Code (1983), to prove beyond a reasonable doubt certain specific intents: intention to cause serious bodily injury and intentional and knowing commission of an act clearly dangerous to human life. Thus, as with proof of involuntariness, trial counsel faced no bar to introduction of the evidence of hypoglycemia for the purpose of demonstrating diminished capacity. His omission to do so was highly prejudicial. Several federal and state courts have held that refusal by a trial court to admit such evidence "downgrades the prosecution's burden to something less than that mandated by due process of law." *Id.* (quoting *Hendershott v. People*, 653 P.2d 385, 390-93 (Colo. 1982), *cert. denied*, 459 U.S. 1225 (1983), and also citing

two other cases). Under such a view, trial counsel's error in omitting to raise the defense prejudiced Petitioner by denying him a fundamentally fair trial.

Trial counsel's proof of hypoglycemia would have allowed him to obtain jury charges on at least two lesser included offenses having mental state requirements of lesser culpability than that of murder: involuntary manslaughter and criminally negligent homicide. *Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984).

Given Petitioner's unimpeached reputation for nonviolence, the otherwise bizarre circumstances of the crime, the opinion of experts that Petitioner suffered from hypoglycemia at the time of the crime, and the lack of any other plausible defense, there is a reasonable probability that, had trial counsel introduced the evidence of hypoglycemia and secured the proper jury charges, Petitioner would have been acquitted or convicted of a lesser offense.

C. PUNISHMENT STAGE INEFFECTIVENESS.

At the absolute minimum, the fact that Petitioner suffered a diabetic-based rage at the time when the State alleged he committed the offense was mitigating evidence that would have explained the conduct to the jury. Trial counsel failed to present hypoglycemia as mitigating evidence with respect to the punishment phase of Petitioner's trial. This omission is unfathomable and amounts to ineffective assistance of counsel under the Sixth Amendment. *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (granting punishment

stage relief in capital case because trial counsel was ineffective for failing to produce evidence of hypoglycemia at the time of the offense for the purpose of mitigation). The failure to present hypoglycemia as mitigating evidence constituted deficient performance under the Sixth Amendment and resulted in a significantly harsher punishment. *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993) (applying *Strickland* to non-capital punishment phase).

Without doubt, the proof that Petitioner was under the effects of hypoglycemia at the time of the alleged offense was mitigating evidence that would have provided the jury with a contributing cause of the otherwise random and aberrant act of violence. In *Collier, supra*, the Eleventh Circuit recently vacated a petitioner's death sentence because trial counsel failed to secure expert testimony at the punishment stage that would have explained the effect of the petitioner's diabetes on his ability to control his behavior on the day of the crimes. *Collier*, 1998 WL 646744, at *21. The petitioner in *Collier*, like Petitioner, had an otherwise unimpeachable background, which the Eleventh Circuit also concluded had not received enough development at the penalty stage. *Id.* At the federal district court, Collier's expert on diabetes testified that, in his opinion, Collier "was suffering from acute hypoglycemia when he committed the crimes in this case." *Id.* at *15.[6] The Eleventh Circuit premised its

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[6] The opinion of Collier's expert, Dr. Buris Boshell, validates the credibility of Petitioner's experts, Drs. Altschuler and Leiser, on the material issues in the instant case. Among other considerations, the facts of Collier's offense demonstrate a

finding that Collier's trial counsel should have pursued expert testimony on Collier's hypoglycemia on a number of factors very comparable to Petitioner's case. *Id.* (noting especially that the defense "likely would have constituted [the] strongest evidence mitigating the crimes [the defendant] committed"). The Eleventh Circuit concluded that, by failing to put on sufficient evidence to show the jury the "stark contrast" between Collier's acts on the day of the offense and his background, and by failing to explain this contrast with expert testimony on Collier's hypoglycemia at the time of the offense, "Collier's counsel precipitated a 'breakdown in the adversarial process.' " *Id.* at *20, *21.

Petitioner's counsel, likewise, undermined Petitioner's case for mitigation at punishment by failing to produce the testimony of Altschuler and Fields, **the strongest evidence mitigating the offense** for which Petitioner was convicted. Prejudice under *Spriggs* is apparent. The jury sentenced Petitioner to a term of incarceration of seventy-five years and a fine of $10,000. The statutory maximum was ninety-nine years or life and a fine of up to $10,000. The statutory minimum was five years probation. Petitioner had no prior criminal record whatsoever! The sentence imposed by the jury was thus very severe. It was precisely what the State asked the jury to impose. Even so, with the dearth of evidence at the punishment

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great deal more apparent purposefulness than Petitioner's. Yet, in Boshell's opinion, Collier was in a hypoglycemic state for the entire criminal episode, including the robbery of the store, flight, apprehension, struggle, appropriation of the weapon, assault by **repetitive, very accurate gunfire at two different victims**, and flight.

stage, it took the jury approximately four hours to reach the verdict. A comprehensible explanation of why Petitioner might have committed the crime, as explained by Petitioner's medical condition, would certainly have gone a long way towards influencing, in a favorable manner, the jury's discretion. The fact that Petitioner's hypoglycemia would have made his alleged conduct less purposeful, even if the jury did not believe his mental state was so diminished at the guilt stage as to exculpate him from the offense, certainly would tend to mitigate his sentence.

There is a reasonable probability that but for counsel's unprofessional conduct in not presenting Petitioner's hypoglycemia on June 7, 1984, to the jury, the jury would have assessed a significantly less harsh sentence.

D. NO EVIDENCE OF REASONABLE TRIAL STRATEGY.

In an affidavit dated July 25, 1997, and in his hearing testimony on August 28, 1997 (E.H. at 242), Mr. Zimmermann responded to Petitioner's claims by asserting that he had prepared a pretrial defense strategy that included a "hypoglycemia defense." The alleged strategy was responsive to "two contingencies":

> 1) Mr. Zimmermann stated that, if the court suppressed Petitioner's "one continuous oral confession," he planned to refrain from putting on defensive evidence and to rest behind the State, in reliance upon what he considered an otherwise weak circumstantial evidence case on the part of the State.

> 2) Mr. Zimmermann stated that, if the court did not suppress the oral confession "in its entirety," he would have considered there no longer to have been "any doubt as to the identity of the shooter," and planned to introduce the "weak defense" that Petitioner suffered from a hypoglycemic seizure at the time of the offense which deprived him of any culpable mental state.

Affidavit at 5.

Mr. Zimmermann claimed, however, that he abandoned his resolve to follow through on the second contingency after the trial court admitted only a portion of Petitioner's oral statements to Officer Irma Sauceda identifying himself as the shooter, a contingency he had not planned for. Mr. Zimmermann maintains that, instead of following through on his pretrial strategy, he adopted a new approach in which the above two contingencies were transformed into a new "tough strategy question" whether to:

> 1) attack the perceptive and recording abilities of the police officer who would transmit Petitioner's oral confessions through her testimony, in order to raise a reasonable doubt about the confessions she conveyed, and to further attack the "weak" circumstantial evidence; or,
>
> 2) concede that Petitioner committed the offense by calling Dr. Altschuler to relate Petitioner's statements to him, incriminating himself and presenting the facts necessary to raise a hypoglycemic reaction defense.

Affidavit at 8. Mr. Zimmermann correctly asserted that any error on the part of the trial court in admitting

Petitioner's confessions could have been preserved under either of these approaches at the guilt stage. *Id.*; E.H. at 283, 286, 336. Mr. Zimmermann stated that he and his colleagues decided, however, that "there was a much better chance of an acquittal or hung jury" with the first line of defense, requiring the State to meet its burden of proof through presentation of the oral confessions and circumstantial evidence, than with the second, attacking the State's proof with the "comparatively weak hypoglycemic reaction strategy."[7] Affidavit at 8; E.H. at 339, 340.

Mr. Zimmermann claimed that, after the jury convicted at the guilt/innocence stage of the trial, he did not put on evidence of Petitioner's hypoglycemia at the punishment stage for two reasons:

> 1) the jury would react negatively to an admission by Petitioner at the punishment stage when Petitioner had maintained innocence at the guilt stage; and
>
> 2) Zimmermann believed that Texas law at the time of Petitioner's trial would have required Petitioner to waive appellate error regarding the admission at the guilt stage of his oral confessions if he "admit[ted] he was the shooter at sentencing."

Affidavit at 9.

Mr. Zimmermann made all of these decisions unilaterally and without directly asking Petitioner whether

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[7] As has been noted, *supra*, this would have been tantamount to deciding not to put on any defense at all over putting on a viable defense.

he wanted to pursue the hypoglycemic defense at either stage of the trial. Additionally, his trial file evidences no legal investigation regarding how he might have applied Petitioner's hypoglycemia to defeat the State's proof of the mental element of the offense. E.H. 244. Admitting the absence of any research in his file (E.H. at 290, 296), Mr. Zimmermann represented that he had been prepared to pursue a mental state defense, but had chosen not to take that path for the above reasons. In examining an attorney's actions at trial, reviewing courts give deference to counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A trial decision is genuinely strategic only when an attorney brings to bear reasonable judgment in evaluating the risks and benefits of the various choices." *Id.* (citing *Chambers v. Armontrout*, 907 F.2d 825, 833 (8th Cir.), *cert. denied*, 498 U.S. 950 (1990)). "Counsel's performance is deficient when it is less competent than the assistance that should be provided by a reasonable attorney under the same circumstances." *Chambers*, 907 F.2d at 828.

Without consulting with Petitioner and seeking his input, and without full legal and factual investigation, Mr. Zimmermann's "strategic choices" at both stages of the trial cannot qualify as "strategic" choices.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF CRIMINAL APPEALS OF TEXAS
[September 16, 1998]

[Post mark Sept. 23, 1998]

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN TEXAS 78711

RE: Writ No. 21,733-02

STYLE: David Isador Port
TRIAL COURT NO: CR85-12B-1

[SEAL] September 16, 1998

This is to advise that the Court has denied without written order on the findings of the trial court after a hearing the application for writ of habeas corpus.

Troy C. Bennett, Jr.

DAVID L BOTSFORD
ATTORNEY AT LAW
1307 WEST AVENUE
AUSTIN TX 78701

Supreme Court, U.S.
FILED

981002 DEC 10 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DAVID ISADOR PORT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

SUPPLEMENTAL APPENDIX

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RESPONDENT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

SIGNED JUNE 3, 1998

NO. CR-85-12B-1

EX PARTE DAVID ISADOR PORT, Applicant	))))	IN THE 207TH DISTRICT COURT OF COMAL COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

1. On March 20, 1985, David Isador Port, the applicant, was convicted by a jury for the felony offense of murder in the 207th District Court of Comal County, Texas, cause number CR85-12B. The jury assessed punishment at seventy-five (75) years confinement in the Texas Department of Criminal Justice – Institutional Division (formerly "the Texas Department of Corrections") and a fine of ten thousand dollars ($10,000).

2. Defense counsel Jack Zimmerman was retained to represent the applicant during the trial of the instant case.

3. On August 12, 1987, the Third Court of Appeals reversed the applicant's conviction in the primary case and remanded the case to the trial court. **Port v. State**, 736 S.W.2d 865 (Tex. App. – Austin 1987).

4. On October 28, 1987, the Third Court of Appeals modified its prior opinion in the primary case. **Port v. State**, 738 S.W.2d 787 (Tex. App. – Austin 1987).

5. On April 25, 1990, the Court of Criminal Appeals reversed the Court of Appeals' judgment on direct appeal and on rehearing and remanded the case to the Court of Appeals. **Port v. State**, 791 S.W.2d 103 (Tex. Crim. App. 1990).

6. On October 10, 1990, the Third Court of Appeals affirmed the applicant's conviction in the primary case. **Port v. State**, 798 S.W.2d 839 (Tex. App. – Austin 1990).

7. On March 25, 1997, habeas counsel David Botsford filed an application for writ of habeas corpus challenging the instant conviction.

8. On August 28-29, 1997, the trial court conducted a writ evidentiary hearing concerning the applicant's habeas contentions of ineffective assistance of counsel, in particular, the applicant's claim that defense counsel Zimmerman's alleged failure to investigate and to present a hypoglycemia defense at the instant trial constituted ineffective assistance of counsel.

9. The Court finds, based on the appellate record. that the applicant gave a series of four statements prior to the applicant's 1985 murder trial; that the trial court conducted a hearing on the applicant's motion to suppress after the commencement of the applicant's trial and after the voir dire proceedings; and, that the trial court held at the conclusion of the hearing on the applicant's motion to suppress that the statement the applicant gave to Police Officer Sauceda was admissible at trial.

10. During the 1997 writ evidentiary hearing, defense counsel Jack Zimmerman testified that he arranged for Dr. Milton Altschuler to examine the applicant shortly after the applicant was released from jail on June 9, 1984, to determine if the applicant was a danger to himself or others; that Zimmerman sent the applicant to Dr. Altschuler because of information that the applicant had related to counsel Dan Cogdell (WH. I-327-8); that Zimmerman met with Dr. Altschuler several times and

received a written report from him on July 30, 1984 (WH. I-230-1); that Dr. Altschuler told Zimmerman that the possibility that the applicant was in a hypoglycemic state during the day of the instant offense should be investigated (WH. I-232); and, that Dr. Altschuler referred Zimmerman to Dr. Jim Fields, an expert in hypoglycemia (WH. I-233).

11. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that he had two trial strategies prior to the applicant's trial; that he would either rest behind the State's case if the trial court suppressed all of the applicant's statements or that he would present the hypoglycemia defense if the trial court did not suppress the applicant's statements (WH. I-242-3); that Zimmerman had discussed the hypoglycemia defense with Dr. Altschuler and Dr. Fields (WH. I-243-4); that, pursuant to that defense, the defense's position would be that the applicant's act was not a voluntary act (WH. I-245); that Zimmerman had previously won an acquittal for Vicki Daniel based on the defense of lack of a voluntary act, a concept with which Zimmerman was very familiar (WH. I-245-6); and that Zimmerman anticipated that the trial court would suppress the applicant's statements but Zimmerman was prepared with Dr. Altschuler and Dr. Fields standing by to testify if the statements were not suppressed (WH. I-250-1).

12. During the 1997 writ evidentiary hearing, defense counsel Zimmerman further testified that both the State and the defense requested that the suppression nearing be held prior to voir dire in the applicant's 1985 trial, but the trial court overruled the requests over objections; that Zimmerman did not think the trial court's

decision rendered him ineffective during voir dire (WH. I-251-2); that Zimmerman did not voir dire on the hypoglycemia defense because he did not want to inform the jury that the applicant had confessed to the offense if the applicant's confession might be suppressed (WH. I-252-3); that Zimmerman made the strategic decision not to proceed on what he viewed as the weak hypoglycemia defense when he learned that only one of the applicant's four statements was being admitted into evidence and, instead, to attack the weak circumstantial evidence case (WH. I-253-4); and, that one lawyer might view certain evidence as weak and another lawyer would not (WH. I-262-3).

13. During the 1997 writ evidentiary hearing, Zimmerman testified that his trial guide, indicated that he anticipated and prepared for Dr. Altschuler and Dr. Fields to testify during the applicant's 1985 trial, but, at some point, placed x's next to their names to indicate that they would not be called as witnesses (WH. I-266-7); that placing Dr. Altschuler on the stand during the applicant's trial to pursue the hypoglycemia defense would waive the applicant's privilege (WH. I-280-1); that, even though Zimmerman had decided by March 12th not to place Dr. Altschuler or Dr. Fields on the stand, Zimmerman telephoned counsel Randy Schaffer on March 12, 1985 to discuss this final strategy decision (WH. I-280-1); that Schaffer also did not want Bernard or Odette Port placed on the stand if it did not help the applicant's case (WH. I-281-2); and, that Zimmerman recalled that Bernard and Odette Port had a federal appeal pending at the time in the Fifth Circuit Court of Appeals as to whether a parent/child privilege existed (WH. I-282).

14. During the 1997 writ evidentiary hearing, Zimmerman testified that he had determined that he could avoid waiver concerning Dr. Altschuler if he was very careful (WH. I-282-3); that Schaffer reaffirmed this for Zimmerman (WH. I-282-4); that Zimmerman's trial notes reflect that Schaffer's opinion was to proceed with great caution so as not to waive the confession error issue (WH. I-284-5); that Schaffer did not know Zimmerman's evidence because of the attorney/client privilege (WH. I-292); and, that Zimmerman did not have a joint defense agreement with Schaffer, counsel for Bernard and Odette Port (WH. I-294).

15. During the 1997 writ evidentiary hearing, Zimmerman testified that the hypoglycemia defense was weak because the applicant had no seizures since the age of seven (WH. I-300); that the applicant could not testify and withstand cross-examination (WH. I-301-2); that a number of people had never seen the applicant having problems with diabetes (WH. I-303); that there was no corroboration of the applicant's statement to Dr. Altschuler about not eating or his taking insulin on the day of the offense; (WH. I-304, 314-5); that there were a number of rebuttal witnesses (WH. I-305); that the applicant told doctors at Presbyterian Hospital in Dallas three months before the trial that he had not had a seizure since the age of seven (WH. I-309); that the applicant had no history of known diabetes complications, and Zimmerman suspected that the State would be aware of this fact (WH. I-310-311, 321); that there were witnesses to the fact that the applicant had previously missed breakfast and had not suffered a hypoglycemia reaction (WH. I-315);

and, that Zimmerman discussed the weaknesses of the hypoglycemia defense with Dr. Altschuler (WH. I-317).

16. During the 1997 writ evidentiary hearing, Zimmerman testified that he did not discuss possible defenses with Bernard Port; that Bernard Port wanted to stay out of everything and did not want to know (WH. I-319); that Zimmerman did not have an obligation to ask Bernard Port about the trial strategy (WH. I-320); that Zimmerman negotiated with the State, discussed the negotiations with the applicant but that the offer was rejected (WH. I-321); and, that Zimmerman disagreed with the contention that the applicant did not agree with the strategy of not presenting the hypoglycemia defense (WH. I-322).

17. During the 1997 writ evidentiary hearing, defense counsel Zimmerman, when cross-examined by the State, testified that counsel Dan Cogdell secured the applicant's release from jail after his arrest in the instant offense, and that the applicant told Cogdell that afternoon what happened prior, during, and after the shooting (WH. I-324-5).

18. During the 1997 writ evidentiary hearing, defense counsel Zimmerman also confirmed that Dan Cogdell's notes reflected that the applicant told Cogdell the following: that the applicant had some sort of seizure and was not himself (WH. I-326); that the applicant saw the mailwoman or lady walking up to the house; that he got a gun from upstairs and told her to open the door at gunpoint; that she put down the mailbag and walked upstairs and fought with the applicant; that the applicant admitted shooting her as she ran downstairs; that he

never wanted to kill anybody before; and that he lied to the police about where he put her body when he said it was in a bayou (WH. I-326-7).

19. During the 1997 writ evidentiary hearing, defense counsel Zimmerman further testified that the applicant's family reported that the applicant had some seizures up until the age of seven; that the applicant's brother had never seen the applicant experience a hypoglycemic reaction as described to him; that the applicant became cranky and weak and could not lift anything when he did not eat properly; that the applicant was not violent; that the applicant's friends reported that they had never noticed any problem with the applicant; that the applicant's female friend stated that she did not even know that the applicant had diabetes; and, that the information gained from everyone interviewed was consistent with the applicant's not having had a hypoglycemic reaction on June 7, the day of the offense (WH. I-328-9).

20. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that the defense conducted a thorough, general investigation as is done in ever case, and that the defense uncovered problems for the State and the State's scientific evidence, such as the applicant's fingerprints not being on the weapon and the blood samples from the applicant's car not matching the complainant's blood type (WH. I-331); that the applicant's half-brother Roger, who looked much like the applicant, had known the complainant and worked near her; that a detective thought Roger was the applicant at one point; that it was suggested that the wrecker driver had also made a mistaken identification; that Zimmerman thought it was a weak circumstantial case based on some

of the investigative things that did not match; and, that the weaknesses in the State's case were brought out during the applicant's trial (WH. I-331-332).

21. During the 1997 writ evidentiary hearing, defense counsel Zimmerman further testified that the State had always taken the position that the applicant's statements were all admissible at the applicant's 1985 trial, and the defense had always taken the position that the applicant's statements were one continuous confession; that there was no way of anticipating that the trial court would "split" the statements and hold that one was voluntary and not the result of custodial interrogation; that Zimmerman was prepared for the contingency of either all the statements being excluded or all being included; and, that he prepared a number of "to-do" lists for the applicant's trial which were periodically updated (WH. I-323-4).

22. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that he was sure that the applicant's case would be reversed on the oral confession issue, but Zimmerman was concerned with somehow confessing a factual issue during the sentencing phase of the applicant's trial; that Zimmerman was concerned with whether the doctrine of curative admissibility applied at sentencing; that Police Officer Saucedo's version of the applicant's oral confession was fiercely attacked during guilt-innocence; that Zimmerman was concerned that the jury would consider the defense liars if Dr. Altschuler admitted during sentencing that the applicant admitted the shooting to him within weeks of the shooting (WH. I-338-9); that Zimmerman was not only concerned with the waiver issue, but he also

thought that there was a much better chance of an acquittal or hung jury using the strategy of attacking Officer Sauceda and the inconsistent scientific evidence rather than using the comparatively weak hypoglycemic reaction theory; and, that everything was done in the applicant's trial based on a conscious decision made after thinking and planning (WH. I 339-340).

23. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that the defense planned to question the prospective jurors about diabetes during voir dire of the applicant's trial if the State did not do so (WH. I-342); that the defense identified prospective jurors whom the State questioned about diabetes; that the defense wanted jurors who had diabetes or a relative with diabetes; but, that the defense did not want to "promise" a hypoglycemia defense not knowing whether the applicant's statements would be admitted or excluded (WH. I-342); that, regardless of who asked the questions during voir dire about diabetes, the defense got the information it wanted; that Zimmerman did not voir dire on whether the prospective jurors could follow the law of suppressing oral confessions because he did not want to jury to know that there had been a confession if it was later suppressed; and, that Zimmerman considered a voir dire concerning reasonable doubt to be a defensive theory (WH. I-342-3).

24. During the 1997 writ evidentiary nearing, defense counsel Zimmerman testified, after reviewing Randy Schaffer's affidavit, that Schaffer's affidavit is not inconsistent with Zimmerman's own affidavit; that Schaffer correctly stated that Zimmerman telephoned him and told him that the trial court had improperly admitted an

oral confession over objection and asked his opinion of resting behind the State and his opinion about waiver; that Schaffer told Zimmerman that he did not know if Zimmerman had reversible error but there was nothing wrong with resting behind the State; and, that Schaffer did not advise him what to do, only to be careful and preserve error (WH. I-344-5).

25. During the 1997 writ evidentiary hearing, defense counsel Zimmerman also testified that the defense decided to attack the one sponsoring witness, Officer Saucedo, when the trial court admitted one confession rather than all the confessions which would have necessitated attempting to attack many sponsoring witnesses (WH. I-350-351).

26. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that the applicant was aware of the trial decisions that the defense was making in his case; that the day's events and the plans for the next day were discussed each night; that the applicant knew that Dr. Altschuler would be a defense witness if wanted but agreed that Dr. Altschuler should not testify; that Zimmerman would have advised the applicant not to testify if he had indicated that he wanted to do so; that Zimmerman would have tried to persuade the applicant against having Dr. Altschuler testify if the applicant had stated that he wanted Dr. Altschuler to testify, but the applicant did not do so; and, that the applicant never indicated or said that he wanted to testify (WH. I-351-3).

27. The Court finds, according to the credible affidavit of counsel Dan Cogdell that Cogdell worked with

counsel lack Zimmerman at the firm of Haynes & Fullenweider until Zimmerman left the firm in either late 1984 or early 1985; that, in Cogdell's opinion, Zimmerman's habit, custom and practice is to thoroughly investigate, research and prepare for each potential issue that might possibly be a factor in representing a client; that Cogdell worked with Zimmerman on the applicant's case but that Cogdell did not try the case with Zimmerman because Zimmerman had left the firm of Haynes & Fullenweider by the time of trial; that, during the several months that Cogdell assisted Zimmerman with the applicant's case all relevant legal issues were thoroughly investigated, researched and analyzed; and, that the applicant's diabetic condition, including the factor of low blood sugar and or hypoglycemia, was thoroughly investigated and researched.

28. The Court finds, according to the credible affidavit of counsel Dan Cogdell, that counsel Zimmerman hired Dr. Milton Altschuler to interview the applicant; that the applicant's diabetic condition was specifically discussed; that relevant literature and periodicals were researched and analyzed; and, that, at least during the period of time in which Cogdell was associated with the applicant's case, the applicant and his family were kept aware of all facets of the investigation and defense strategy.

29. The Court finds, according to the credible affidavit of counsel Dan Cogdell, that, in Cogdell's opinion, at least up to the point in time that counsel Zimmerman left the firm of Haynes & Fullenweider, hypoglycemia was not a viable defense to be raised during the guilt-innocence phase of the applicant's trial; that raising such

an issue before the jury would be, functionally, a confession; and, that raising such a defense would have been a mistake, based on Cogdell's then understanding of hypoglycemia, as well as the absence of available defense evidence to support a lack of specific intent or lack of voluntariness defense.

30. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman, that counsel was aware prior to trial of the applicant's diabetic condition; that the applicant's mother informed counsel that the applicant's seizures stopped at the age of seven or eight; that the applicant lived with his mother until about seven months before the offense; that counsel's notes reflect that Bernard Port informed counsel that the applicant had no history of hypoglycemia; that the issue of hypoglycemia was raised with Dr. Milton Altschuler, a psychiatrist working for the defense; that Dr. Altschuler suggested that such a condition could be used for an insanity defense but also acknowledged that hypoglycemia is not a mental disease or defect; that Dr. Altschuler recommended consultation with Dr. Jim Fields concerning diabetes; that a conference was held with Dr. Fields about the possible effects of taking insulin and not eating properly; that interviews with the applicant's friends and family concerning the applicant's diabetic condition revealed that the applicant had no history of hypoglycemia or hypoglycemic reactions; that the applicant became cranky and weak, rather than violent if he did not eat; and, that the applicant sounded normal to a friend the applicant telephoned about lunch time on the day of the offense.

31. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman, that counsel was aware that the State was investigating the issue of hypoglycemia for the applicant's trial; that counsel was aware that the State had questioned the applicant's friends and family concerning such issue; that counsel was aware that the friends and family had told the State that they had never noticed anything unusual about the applicant's illness, medication, and eating habits; that one friend was not even aware that the applicant suffered from diabetes; and, that Bryan Port testified before the grand jury that the applicant had not had his insulin for two days and that the applicant would become cranky and weak, but not violent, when he did not eat.

32. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and according to counsel Zimmerman's 1997 writ hearing testimony, that counsel prepared a defense strategy based on whether the trial court suppressed the applicant's oral confession; that the defense would rest behind the State if the confession was suppressed; but, that the defensive theory of a hypoglycemia reaction would be used if the confession was admitted into evidence and the identity of the shooter was no longer at issue.

33. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and according to counsel Zimmerman's 1997 writ hearing testimony, that counsel was aware of weaknesses in the hypoglycemia defense, such as the applicant's inability to withstand cross-examination, the applicant's admission of the shooting to Dr. Altschuler, and the numerous witnesses who could testify as to the absence of a problem,

seizures, and/or hypoglycemic reactions or symptoms by the applicant.

34. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and according to the appellate record in the applicant's case, that the State questioned prospective jurors during voir dire about knowing someone with diabetes; that trial counsel did not object because counsel needed the information if the defense proceeded with a theory of hypoglycemic reaction; and, that voir dire was conducted over defense counsel's objection, prior to the motion to suppress hearing so that counsel did not know the court's ruling as to the admissibility of the applicant's confession.

35. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman, that, upon the applicant's release from jail on June 7, 1984, the applicant told counsel Dan Cogdell that he had some type of seizure and was not himself; that the applicant described the events of the killing to Cogdell, including seeing the complainant walk up to the applicant's house, the applicant's getting a gun from upstairs, telling her to open the door at gunpoint, her putting down the mailbag and walking upstairs, her fighting with the applicant, and the applicant's shooting her in the head as she ran downstairs.

36. The Court further finds, according to the credible affidavit of defense counsel Jack Zimmerman, that the applicant told counsel Dan Cogdell that he never wanted to kill anybody before and that he had lied to the police about where he placed the complainant's body.

37. The Court further finds, according to the credible affidavit of defense counsel Jack Zimmerman, that

the applicant later told counsel Zimmerman that he had a hard time remembering the day of the offense and that he had had problems from eating wrong or taking the wrong amount of insulin.

38. The Court finds that, according to the credible affidavit of defense counsel Jack Zimmerman, that Dr. Altschuler's handwritten notes from his July 10, 1984 interview with the applicant state that the applicant did not remember getting the gun, but saw the mail woman from "disembodied eyes;" that the next thing he knew the girl was on the ground; that Dr. Altschuler's handwritten notes from his July 23, 1984 interview with the applicant reflect that the applicant "seemed to have snapped out of it while shooting" and that while the applicant "remembered going into the room, he could not remember exactly how she got in the house;" that Dr. Altschuler's July 30, 1984 typed report states that the applicant told Dr. Altschuler that he did not eat breakfast or lunch although he had taken his usual insulin; that the applicant reported that his memory was hazy after lunch; and that the applicant described the incident as seeing "the mail woman on the ground."

39. The Court finds that the applicant's subsequent claim of impaired memory is contradicted by his early description of the instant offense and that the applicant admitted to a memory of the events before, during, and after the offense.

40. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and counsel Zimmerman's 1997 writ hearing testimony, that, after the trial court ruled that the applicant's oral statements at the

arrest scene, bayou and police station were not admissible, but that the applicant's oral statement made in the police car to Officer Irma Sauceda during the ride to the police station was admissible, counsel made the trial strategy decision to attack the credibility of Officer Sauceda's ability to hear and write all she claimed concerning the applicant's statement to her and, in the event of a conviction, to pursue the issue of trial court error concerning the motion to suppress.

41. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and a review of the appellate record, that trial counsel elicited evidence and/or presented information of the applicant's diabetes and its adverse effects through cross-examination of Officer Sauceda at guilt-innocence, from counsel's opening statement at guilt-innocence after the State rested, through questioning of Michael Buckingham during the defense's case on the merits, and from questioning of Bryan Port during the punishment phase.

42. The Court finds, according to the credible affidavit of defense counsel Jack Zimmerman and counsel Zimmerman's 1997 writ hearing testimony, that counsel informed the applicant of strategic trial decisions and the applicant's right to testify, but advised the applicant against testifying; that the applicant chose to plead not guilty, to be tried by a jury, and not to testify; and, that the applicant did not object or indicate that he objected to any strategic trial decisions.

43. During the 1997 writ evidentiary hearing, Dr. Eric Orzeck testified that he was a medical doctor with

two fellowships in endocrinology; that he has approximately 100 publications, the majority of which deal with diabetes; that approximately half of his private practice is devoted to diabetic patients; and, that he sees insulin reactions on a daily basis (WH. II-414-8).

44. Dr. Eric Orzeck further testified during the 1997 writ evidentiary hearing, that diabetes means that the blood sugars are too high; that the management of diabetes requires that blood sugars not be too high or too low; that such management is done through constant balance of diet, exercise, and insulin; that a diabetic's blood sugar will decrease if he receives too much insulin; that a hypoglycemic state occurs if blood sugar falls very low; and, that a diabetic's blood sugar will rise if he receives too little insulin which could result in a diabetic coma (WH. II-419-20).

45. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that he has personally witnessed approximately thousands of hypoglycemic states; that these hypoglycemic states have consistent symptoms or manifestations; that the individual initially becomes hungry because the brain is sending the body a message to take in food to raise the blood sugar; that there may be a cold sweat, rapid heartbeat, confusion, and disorientation; and, that the individual will become responsive to his situation if the blood sugar continues to fall causing insulin shock or diabetic shock (WH. II-421).

46. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that an individual in a hypoglycemic state is not capable of committing a cognitive, purposeful act; but, an individual in a hypoglycemic state could

perform a reflexive action such as knocking a glass of orange juice from someone's hand who is trying to get the individual to drink the juice; that such individual would not have the ability to think in a cognitive fashion such as reaching and picking up a gun on a table and shooting the gun; that such individual is in a reflexive state which does not move past the level of self-preservation; and, that Dr. Orzeck had never witnessed a diabetic in a hypoglycemic state perform an aggressive, non-defensive type of violent action (WH. II-422-3).

47. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that, prior to his writ hearing testimony, he reviewed the police report of the instant offense and the applicant's records, such as the medical records from Dr. Frank Hill, from the junior League Clinic of the Texas Childrens Hospital, from the Houston City Jail, from the Houston Guidance Center, and from the applicant's school in Spring Branch; that based on Orzeck's review of the applicant's records, Orzeck did not think the term "seizure" contained in the applicant's records until the applicant was about nine years old was correctly used; that a better diagnosis would have been severe hypoglycemia caused by poor diabetes management; that it is common for young children to have difficulty with diabetes management; and, that the applicant stopped having seizures or hypoglycemic episodes in the mid-late 1970's (WH. II-425-9).

48. During the 1997 writ evidentiary hearing, Dr. Orzeck, when presented with the hypothetical of an insulin-dependent diabetic taking his morning insulin, leaving the house, not eating breakfast, running errands, getting hazy, going home and seeing a woman lying on

the floor and becoming frightened, and then getting hungry, testified that such individual would have become hungry earlier than was presented in the hypothetical; that everything a person's body does is to nourish the brain and to keep the brain's glucose levels appropriate so a manifestation of a hypoglycemic state is hunger (WH. II-429-30).

49. During the 1997 writ evidentiary hearing, Dr. Orzeck, when presented with the hypothetical of a diabetic already having a gun in his hand when he went into hypoglycemic state, testified that it would be highly unusual but possible for the diabetic to pull the trigger once as a reflexive action, but it would not be possible for him to continue pulling the trigger or do anything other than that one event (WH. II-432-3).

50. During the 1997 writ evidentiary hearing, Dr. Orzeck, when presented with the hypothetical of a seventeen-year old diabetic pulling a gun on a female who approached his ~~house~~, forcing her into the house, forcing her to the top of the stairs at gunpoint, firing his gun several times and striking the female twice when she struggles and runs down the stairs; going downstairs to check her pulse to determine if she is dead; cleaning up the blood on the floor so his parents will not find out, washing his bloody tennis shoes, putting the female's body in trash bags, placing the female's body in the trunk of his car, driving around a time, going to a game room and playing games and eventually dumping the female's body in a field, testified that it would be totally impossible for this seventeen-year old diabetic to commit these acts while in a hypoglycemic state; that it would have been impossible for him to have performed any one of

these acts and he definitely could not have performed them all in sequence (WH. II-434).

51. During the 1997 writ evidentiary hearing, Dr. Orzeck further testified that excitement or stress raises the blood sugar level so that the hypothetical seventeen-year old diabetic's blood sugar would be raised by the excitement of committing a murder and that the increase in blood sugar would tend to decrease the possibility of hypoglycemia (WH. II-435).

52. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that an individual would have no memory after a hypoglycemic state because the brain is incapable of having information imprinted on it during the hypoglycemic state; that 99% of the time there is no memory of the event; but, in the very, very small percentage of time where there is a memory, the memory does not change over time (WH. II-435-6).

53. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that, prior to his writ hearing testimony, he reviewed the applicant's petition for writ of habeas corpus, including the article "Problems in Criminal Psychology Related to Hypoglycemia" which is attached as an exhibit to the applicant's petition for writ of habeas corpus and is labeled tab 9; that there was no comparison of the present knowledge and treatment of diabetes to the knowledge at the time the article was written in the 1940's; that certain passages in the article stigmatized diabetes the same as epilepsy had been previously stigmatized; that the medical community had determined that such stigmatization is not warranted; and that in Dr.

Orzeck's expert opinion, the article has no scientific validity (WH. II-436-40).

54. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that most diabetics were aware of the results of either too much or too little insulin; that a diabetic could chose to disregard the factors involved in managing diabetes and suffer the consequences; that a hypothetical seventeen-year old diabetic who constantly ate junk food indicated that the diabetic was consciously and willfully doing something detrimental to his health; and, that diabetes is not considered a disease of the mind equivalent to psychiatric disorders (WH. II-41-2).

55. During the 1997 writ evidentiary hearing, Dr. Orzeck testified that he consulted with Mary Milloy from the Harris County District Attorney's Office prior to the applicants trial for the instant offense; that Dr. Orzeck was prepared to testify as an expert witness for the State in the applicant's trial for the instant offense; and, that his testimony at the applicant's trial in 1985 would have been the same as his testimony during the 1997 writ evidentiary hearing concerning the effects of too little insulin, the effects of too much insulin, the manifestations or symptoms of hypoglycemia, the acts of which a person is capable while in a hypoglycemic state, and his answer to the hypothetical of the seventeen-year old diabetic who forces a woman at gunpoint into his house, struggles with her, shoots a gun several times as she is fleeing, hits the woman twice with gunshots, and then does all the cleaning and covering up activity (WH. II-443, 468).

56. In response to questioning by the Court during the 1997 writ evidentiary hearing, Dr. Eric Orzeck testified that he had been present in the courtroom during the testimony of the two doctors presented by the applicant in the instant writ hearing and that Dr. Orzeck found completely implausible their medical testimony that the applicant was suffering from a hypoglycemic disorder at the time of the offense (WH. II-470); **See Findings nos. 57-68, infra.**

57. During the 1997 writ evidentiary hearing, Dr. Milton Altschuler testified for the applicant that Altschuler met with defense counsel Zimmerman and discussed his report regarding the applicant with Zimmerman (WH. I-57); that Zimmerman also consulted with endocrinologist Dr. Jim Fields (WH. I-62); that Altschuler traveled to New Braunfels to testify at the guilt-innocence phase of the instant trial but was not called as a witness (WH. I-63-65); that defense counsel Zimmerman never talked to Altschuler about testifying at the guilt-innocence phase of the applicant's trial (WH. I-119); that less than one percent of Altschuler's practice was based on diabetes and Altschuler was not an expert on diabetes (WH. I-75-80); that Altschuler could find nothing to suggest that the applicant had a mental illness at the time of the instant offense (WH. I-33, 44); and, that the applicant scored lowest in his comprehension of appropriate behavior in every day life in psychological testing, and the applicant would be relatively socially withdrawn and isolated and more comfortable with non-human things, such as automobiles (WH. I-43).

58. Dr. Altschuler further testified, during the 1997 writ evidentiary hearing, that the applicant related the

following details regarding events on the day of the instant offense; that the applicant was unhappy about going on an Outward Bound program; that the applicant took his insulin but did not eat breakfast; that the applicant did errands and began getting hazy; that the applicant remembered seeing a woman and remembered the woman lying down; that the applicant got frightened and ate something; that the applicant next remembered running out of gas in his car; and that the applicant described seeing through tunnel vision surrounded by fog and seeing things in a fragmented manner (WH. I-46-48).

59. According to Dr. Altschuler's July 30, 1984 written report, Dr. Altschuler stated that he conducted a psychiatric evaluation of the applicant at the request of defense counsel Zimmerman; that Dr. Altschuler met with the applicant on eight occasions, June 13,1984 to July 17, 1984, and reviewed the applicant's school records and medical records; that the applicant was diagnosed with juvenile type diabetes in 1969 at the age of two years and treated with insulin; that, endocrinologist Dr. Hill saw the applicant at age four and the applicant had a history of twenty minute "spells;" that the applicant went limp, fell, got back up, fell again, and thrashed about wildly with his jaws clamped shut during a "spell;" that the applicant's "spells" were eventually attributed to poorly controlled diabetes; that the applicant was evaluated in 1980 by the Blue Bird Clinic at his mother's request; that the Blue Bird Clinic's intake history reflected that the applicant had a very short temper, argued constantly with his siblings, and destroyed household items and apparel with scissors; that the applicant explained that the cause

of his behavior was that he was tired of his stepmother interfering with the applicant's relationship with his father; that counseling changed the behavioral patterns of the family; that the applicant's family did not return to the clinic even though the clinic recommended further counseling; that the applicant's school records indicated no abnormal behavioral problems or signs of withdrawal, anger, argumentativeness, or decreased social interaction; that the applicant's psychological tests indicated feelings of inadequacy; that the applicant's I.Q. was 96; and, that occasionally, the applicant did not eat breakfast. **Application for Writ of Habeas Corpus, Exhibit 2, July 30, 1984 report by Milton Altschuler, M.D.**

60. According to Dr. Altschuler's July 30, 1984 report, Dr. Altschuler stated that the applicant did not have an underlying severe psychiatric illness; that there was no evidence of a characterological problem that could be interpreted as having anti-social or dysocial characteristics; and, that on the day of the instant offense, the applicant went into a severe hypoglycemic state. **Application for Writ of Habeas Corpus, Exhibit 2, July 30, 1984 report by Milton Altschuler, M.D.**

61. The Court finds, according to Dr. Altschuler's 1997 writ evidentiary hearing testimony, that the applicant was Altschuler's sole source for information regarding the instant offense (WH. I-91); that Altschuler relied on the applicant's recitation of the facts regarding the instant case and the applicant's statements regarding loss of memory and confusion to formulate his diagnosis that the applicant was in a hypoglycemic episode with central nervous symptomatology at the time of the instant offense (WH. I-56, 92-94); that Altschuler relied on the

applicant's contentions of alleged memory loss and confusion and no other symptoms to formulate his diagnosis (WH. I-93); that Altschuler assumed that the applicant was truthful (WH. I-94); and, that Altschuler thought that the applicant was cooperative, demonstrated no attempt to fabricate, and did not have the mental ability to fabricate (WH. I-66-108).

62. The Court further finds, during the 1997 writ evidentiary hearing, that Dr. Altschuler acknowledged that the applicant had a motive to lie and explain away the instant offense; that memory loss and confusion could be indicative of other diseases or conditions (WH. I-92-93, 98); that the absence of one of the symptoms, i.e. memory loss or confusion, would render Altschuler's diagnosis very questionable (WH. 98-99); and, that Altschuler would change his diagnosis if the applicant demonstrated a more extensive memory regarding the instant offense than that related to Altschuler during the applicant's interviews (WH. I-99, 102-109).

63. During the 1997 writ evidentiary hearing, Dr. Altschuler further testified that potential diagnoses, such as Alzheimer's, Parkinson's, or loss of oxygen, which are characterized by memory loss or confusion, were ruled out by the applicant's psychological testing (WH. I-109); and, that Altschuler observed variations in the applicant's memory which were consistent with someone who was very frightened and operating at a low normal I.Q. (WH. I-113).

64. Dr. Altschuler further testified, during the 1997 writ evidentiary hearing, that the blood sugar goes below a normal level in a hypoglycemic episode (WH. I-48); that

the diabetic experiences sweating and dizziness which are warnings to ingest sugar quickly when he takes too much insulin or fails to eat sufficiently (WH. I-48, 77-78); that weakness is also characteristic of a hypoglycemic episode (WH. I-77-78); that central nervous system issues, such as confusion, disorientation, combativeness, hostility, irritability and possibly a coma, manifest themselves if the diabetic fails to eat (WH. 49); that a person in a hypoglycemic reaction can have a rage reaction and that person's perceptions can change (WH. I-114-115); that a person in a hypoglycemic reaction is not in control of his actions, not conscious of his actions, and cannot do things voluntarily (WH. I-50); that someone suffering a hypoglycemic reaction can still function at a certain level, i.e. walking or driving a car (WH. I-51, 104); that one would come out of a hypoglycemia state by ingesting food or sugar and adrenaline can have some impact on one emerging from a hypoglycemic state (WH. I-52-53); the hypoglycemic reactions are sporadic and it would not be unusual that no one had seen the applicant have a hypoglycemic reaction for five to ten years (WH. I-65-66); that the memory of a person who just emerged from a severe hypoglycemic reaction would be spotty, and the ability to remember would change with time (WH. I-67, 111-112, 117); that questions regarding events that transpired during a hypoglycemic episode and questions suggesting scenarios might implant a memory that did not exist (WH I-68); that the brain operates on several levels, and the highest cortical level is most sensitive to loss of sugar or air (WH I-51); that, if there is a decrease in glucose for any significant period of time, brain cells become inefficient and behavior is of an autonomic type that occurs

without much thought (WH. I-51); that the cortical layer of the brain deals with thought, initiation, planning, and carrying forth planned action while the subcortical layer maintains bodily functions (WH. I-86-87); that one cannot drive a car, think a thought, or commit a purposeful act with only subcortical cells functioning (WH. I-88); and, that one cannot commit a purposeful planned act during a hypoglycemic state where the subcortical cells take over (WH. I-89).

65. The Court finds, during the 1997 writ evidentiary nearing, that Dr. Altschuler acknowledged in his testimony that it is very rare to have a total loss of cortical matter which is that part of the brain dealing with thought, initiation, planning, and carrying forth planned action, and that the applicant's actions during the instant offense, as recited by the applicant to an attorney following the instant offense, required purposeful acts or cognitive thoughts (WH. I-102-104).

66. During the 1997 writ evidentiary hearing, Dr. Alfred Leiser, an internist with an endocrinology specialty, testified for the applicant that he reviewed materials supplied to him by habeas counsel which included Dr. Altschuler's report and that he listened to Altschuler's testimony at the instant habeas evidentiary hearing (WH. I-125-127); that the materials that Leiser reviewed were consistent with Leiser's diagnosis and the diagnosis of Dr. Altschuler (WH. I-128-129, 148); that hypoglycemia, with involvement by the central nervous system, was the likely cause of the instant offense (WH. I-128-129); that, prior to the instant offense, the applicant's diabetic condition was not monitored by a doctor,

and the applicant was self-regulating in the administration of his insulin (WH. I-132, 149); that Leiser was aware that the applicant had no prior felony record and that the applicant had no anti-social or sociopathic tendencies (WH. I-147-148); that, on the day of the instant offense, the applicant was upset about an Outward Bound program and was having family problems which probably would have contributed to his response to a hypoglycemic episode (WH. I-149); that it would not be unusual for a Type I diabetic, such as the applicant, not to experience the warning signs for hypoglycemia, such as sweating, shaking, and nervousness (WH. I-130-131); that there would be no warning until the mental changes or aberrant central nervous system effects occurred (WH. I-131); that it was consistent that the applicant's hypoglycemia reaction began in late morning and hit the severe stage by 12:30 P.M. to 2:00 P.M. (WH. I-133); and, that the applicant could not have done anything voluntarily, assuming that the applicant was in a severe hypoglycemic reaction at the time of the instant offense (WH. I-135).

67. Dr. Leiser further testified, during the 1997 writ evidentiary hearing, that someone in a severe hypoglycemia state is generally disoriented and cannot plan to do something (WH. I-133-134); that a rage reaction is not voluntary (WH. I-134); that sometimes there is amnesia for the total hypoglycemia reaction or the memory is spotty (WH. I-135-136); that it is possible that the memory of someone who had suffered a hypoglycemic reaction would change (WH. I-136); that it is possible for an

individual to drive a car 20 to 30 miles while in a hypoglycemic reaction and for that action not to be a voluntary, knowledgeable act (WH. I-138); that it is possible to have a severe hypoglycemic reaction and function adequately physically and mentally without a recollection of events (WH. I-138-139); and, that the motor polymer is well-preserved in a hypoglycemic reaction (WH. I-139-140).

68. The Court finds that, during the 1997 writ evidentiary hearing, Dr. Leiser acknowledged in his testimony that there can be voluntary action when a person is in a severe hypoglycemic reaction (WH. I-134); that Leiser had never met the applicant and that Leiser had no contact with defense counsel Zimmerman or Dr. Altschuler in 1984 and 1985 (WH. I-125); that Leiser was not aware that the applicant had failed to eat breakfast on other mornings prior to the instant offense and that the applicant's regular dosage of insulin differed from that allegedly taken by the applicant on the day of the instant offense (WH. I-142-144); that any expert medical opinion based on the applicant's recitation of facts regarding the instant offense would be less accurate if the applicant was not truthful regarding the events of the instant offense (WH. I-144); and, that there are many variables in evaluating a hypoglycemic reaction, i.e. diet, insulin administered, events, so that the failure to receive an accurate report of those variables would lessen the accuracy of a doctor's review of a hypoglycemic episode (WH. I-145-146).

69. During the 1997 writ evidentiary hearing, Bernard Port, the applicant's father, testified that he was in Mexico City during the applicant's trial; that counsel

Zimmerman knew his location and phone number; that Zimmerman instructed him to leave the country to avoid being subpoenaed; that Zimmerman did not tell him prior to the applicant's trial that Zimmerman intended to present a defense based on the applicant's diabetic condition on the day of the offense; but, that Zimmerman talked with Bernard Port about an insulin reaction or a diabetic reaction (WH. II-398-99).

70. During the 1997 writ evidentiary hearing, Bernard Port, during the State's cross-examination, acknowledged that he had been incarcerated in the Harris County jail because of his refusal to testify to the grand jury regarding the applicant's case, and that the applicant was counsel Zimmerman's client in 1984 and 1985 (WH. II-403-4).

71. During the 1997 writ evidentiary hearing, defense counsel Zimmerman testified that he referred the applicant's father, Bernard Port, and stepmother, Odette Port, to defense counsel Randy Schaffer because it would be a conflict of interest to represent all three; that Bernard and Odette Port received grand jury subpoenas; that Zimmerman did not have a joint defense agreement with Randy Schaffer (WH. I-235-6); that Zimmerman learned that the applicant had a disability and an I.Q. in normal-low range; that Zimmerman wanted to talk with Bernard Port about the applicant's alleged disability and I.Q.; that Zimmerman made efforts to keep Bernard Port informed of the applicant's situation (WH. I-237); that Zimmerman met with Bernard Port a number of times (WH. I-238); that both Bernard and Odette Port were incarcerated in jail for some time; that Bernard Port was released before

Odette Port was released; that Odette Port was incarcerated until the end of the grand jury term; and, that both Bernard and Odette Port were out of jail by February, 1985 (WH. I-239-40).

72. During the 1997 writ evidentiary hearing, defense counsel Zimmerman further testified that he never told or suggested to Bernard Port that Bernard admit to the shooting after Bernard Port received immunity; and, that Zimmerman did not discuss with the applicant the possibility of going to the court rather than the jury for punishment because the jury could give the requested probation and the court could not (WH. I-361-2).

73. During the 1997 writ evidentiary hearing, Zimmerman further testified that Bernard and Odette Port were out of the country during the applicant's trial and were not at the applicant's trial; that the Ports were not out of the country at Zimmerman's direction or suggestion; that Zimmerman did not advise the Ports to leave the jurisdiction; and, that Zimmerman remembered driving back to Houston with Bernard Port after the trial so the Ports did come to New Braunfels at some point (WH. I-242).

74. During the 1997 writ evidentiary hearing, attorney David Schulman, a witness for the applicant, testified that he had reviewed the statement of facts and transcript of the instant trial and the affidavit of defense counsel Zimmerman (WH. I-156-157); that defense counsel Zimmerman was not properly prepared for the instant trial (WH. I-161); that Zimmerman's strategy was unacceptable or unreasonable (WH. I-161-162); that Zimmerman's

performance fell below prevailing professional levels (WH. I-162); and, that Zimmerman's deficient performance was prejudicial (WH. I-163).

75. Schulman further testified. during the 1997 writ evidentiary hearing, that it was hard to determine the prejudicial effect of defense counsel Zimmerman's alleged deficient performance at guilt/innocence WH. I-213-214): that defense counsel Zimmerman should have obtained a ruling on his motion to suppress prior to voir dire: that reasonable counsel would have pushed the trial court to conclude all pretrial matters prior to voir dire (WH. I-164, 172); that defense counsel Zimmerman did not establish a strategy prior to voir dire and was not prepared for the judge's ruling on the motion to suppress (WH. I-166, 172); that defense counsel Zimmerman should have objected at the earliest opportunity to the State injecting the issue of diabetes into voir dire if Zimmerman was not going to present the diabetes evidence (WH. I-163-166); that, in his voir dire, Zimmerman did not prepare the jury for suggestions that oral confessions were unreliable (WH. I-184); that defense counsel, Zimmerman's pretrial strategy, specifically, to rest with the State if the court suppressed the confessions or to present the hypoglycemia defense if the trial court did not suppress the confessions, was not reasonable (WH. I-173-176); that, if the trial court suppressed the applicant's confessions, it would have been unreasonable not to present the hypoglycemia defense because the circumstantial evidence against the applicant was "overwhelming" (WH. I-176); that, after the trial court ruled on the motion to suppress, it was not reasonable for Zimmerman to change his strategy and concentrate on attacking the

confessions by questioning Officer Sauceda's credibility and the circumstantial evidence rather than present the hypoglycemia defense (WH. I-181); that Zimmerman could have presented the hypoglycemia defense at the guilt phase of trial without waiving a challenge on appeal to the trial court's ruling on the motion to suppress (WH. I-184-185); that the privilege and sentencing waiver should have been researched before jury selection began (WH. I-197); and, that, if a central feature in Zimmerman's decision not to present the hypoglycemia defense was a desire to preserve the oral confession ground for appeal, that decision would have been below prevailing professional norms (WH. I-206).

76. Schulman further testified during the 1997 writ evidentiary nearing, that defense counsel Zimmerman's failure to present punishment evidence regarding the applicant's diabetes was egregious error (WH. I-210-211); that. while there was some evidence of the applicant's diabetes at punishment, there was no evidence of substance (WH. I-214); and, that defense counsel abandoned the only chance he had of showing something in mitigation by not presenting evidence of the applicant's diabetes as punishment (WH. I-214).

77. Schulman further testified, during the 1997 writ evidentiary hearing, that he sat as lead counsel in three murder trials but never as lead counsel in a capital murder trial (WH. I-216).

78. During the 1997 writ evidentiary hearing, attorney Terrence Kirk testified, for the applicant, that he exclusively practiced criminal law; that he had never sat as lead trial counsel in any case; that he sat as second

chair in two murder cases; and that, in his professional opinion, counsel Jack Zimmerman's performance was deficient and prejudicial in the applicant's case (WH. II-379-97).

79. The Court finds that attorney David Schulman's conclusions and attorney Terrence Kirk's conclusions regarding the effectiveness of applicant's trial counsel are speculative and based on hindsight.

80. The Court finds, based on a review of the appellate record, defense counsel Jack Zimmerman's affidavit, and counsel's 1997 writ hearing testimony, that defense counsel was familiar with the facts of the offense and the applicable law; that counsel investigated and prepared a defense based on the theory of hypoglycemia or insulin reaction: that counsel interviewed witnesses, that counsel engaged the assistance of expert witnesses: that counsel informed the applicant of the proceedings throughout; and, that counsel made strategic trial decisions based on the trial court's ruling on the defense's motion to suppress the facts of the offense, and factors concerning a direct appeal in the event the applicant was convicted.

81. The Court finds, based on the evidence elicited during the 1997 writ evidentiary hearing and the credible assertions in the affidavit of defense counsel Zimmerman, that defense counsel thoroughly investigated the defensive theory that the applicant was in an alleged hypoglycemic state at the time of the instant offense and made reasonable trial decisions concerning such strategy.

82. The Court finds that the 1997 writ evidentiary hearing testimony of Dr. Eric Orzeck was in all things credible.

83. The Court further finds that the 1997 writ evidentiary hearing testimony of Dr. Milton Altschuler was not credible as to any material evidentiary fact issue.

84. The Court further finds that the 1997 writ evidentiary testimony of Dr. Al Leiser was not credible as to any material evidentiary fact issue.

85. The Court finds that the 1997 writ evidentiary testimony of Bernard Port, the applicant's father, was not credible as to any material fact issue.

86. The Court finds that attorney David Schulman lacks sufficient trial experience to proffer credible testimony as to any material fact issues in the applicant's case.

87. The Court further finds that attorney Terrence W. Kirk lacks sufficient trial experience to proffer credible testimony as to any material fact issues in the applicant's case.

88. The Court finds, based on the appellate record, that the jury was instructed at the guilt-innocence phase of the applicant's 1985 murder trial, that

> Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.
>
> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

89. The Court finds that the application paragraph of the jury charge at guilt-innocence instructed the jury, as follows:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 7th day of June, 1984, in Harris County, Texas, the defendant, David Isador Port, did intentionally or knowingly cause the death of Debora Sue Schatz, hereafter styled the Complainant, by shooting the Complainant with a firearm, or did then and there unlawfully intend to cause serious bodily injury to Debora Sue Schatz, and did cause the death of the Complainant by intentionally or knowingly committing an act clearly dangerous to human life, namely, by shooting the Complainant with a firearm, then you will find the defendant guilty of murder as alleged in the indictment.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt as to whether the defendant is guilty of murder, then you will find him not guilty.

90. The Court finds that defense counsel did not object to the jury charge at guilt-innocence on the basis of the definitions of "intentional" and "knowingly" being

applicable to the nature of the applicant's conduct rather than strictly the result of the applicant's conduct.

91. The Court finds that defense counsel did not request a specific jury charge at guilt-innocence concerning the definitions of "intentional" and "knowingly" based strictly on the result of the applicant's conduct, rather than the nature of the applicant's conduct.

92. The Court finds that capital murder defendant Jessel Turner complained on direct appeal that the definitional portion of the jury charge at the guilt-innocence phase of his trial failed to instruct the jury that Turner had to have the conscious desire to cause the victim's death. **Turner v. State**, 805 S.W.2d 423, 430-431 (Tex. Crim. App. 1991).

93. The Court further finds that the jury in Jessel Turner's capital murder trial was given the following definition: "a person acts intentionally, or with intent, with respect of the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." **Turner**, 805 S.W.2d at 430.

94. The Court further finds that the application paragraph in the jury charge in Jessel Turner's murder trial instructed the jury as to determine whether Turner "intentionally caused the death." **Turner**, 805 S.W.2d at 431.

95. The Court further finds that the Court of Criminal Appeals. In its concurring opinion denying Turner's motion for rehearing, in **Turner**, applied a harm analysis and found that "there was no objection and there was

some limiting instruction in the court's charge (e.g. intentionally caused the death). Thus, there was no egregious harm under **Almanza v. State**, 686 S.W.2d 157 (Tex. Crim. App. 1984) (Opinion on State's Motion for Rehearing), and the correct result was reached." **Turner**, 805 S.W.2d at 432.

96. Subsequently, the Court of Criminal Appeals reviewed Lawrence Cook's contention on direct appeal that the trial judge erred in overruling Cook's objection to the jury charge definitions of "intentionally" and "knowingly" and in overruling Cook's requested jury instructions to limit the definitions of "intentionally" and "knowingly" submitted in the jury instructions during the guilt-innocence phase of Cook's murder trial. **Cook v. State**, 884 S.W.2d 485, 486 (Tex. Crim. App. 1994).

97. In **Cook**, the Court of Criminal Appeals held that the trial judge erred in not limiting the definitions of the culpable mental states as they related to the conduct elements involved in the particular offense, and stated "[however, finding error in the jury charge begins, rather than ends, the appellate court's inquiry. The next step is to make an evidentiary review as well as a review of the record as a whole which may illuminate the actual, not just theoretical harm to appellant." **Id.** at 491-2.

98. Based upon a review of the entire record in the applicant's case, including the applicant's admitted confession, the Court finds that any error in the jury charge concerning limitation of the definitions of "intentionally" and "knowingly" does not constitute egregious harm, nor does such portion, by itself, of the jury charge so infect

the applicant's entire trial that his resulting conviction violates due process.

CONCLUSIONS OF LAW

1. Based upon a review of the applicant's claims of ineffective assistance of counsel at trial, the applicant fails to demonstrate deficient performance much less harm in the following areas: defense counsel Zimmerman's alleged failure to adequately investigate the law and present the defense during guilt-innocence of the trial that the applicant was in an alleged hypoglycemic state at the time of the instant offense; defense counsel Zimmerman's alleged failure to investigate the law and present during the punishment phase of the trial that the applicant was allegedly in a hypoglycemia state at the time of the offense; defense counsel's alleged failure to raise the applicant's alleged hypoglycemia in an effort to mitigate the applicant's sentence; defense counsel Zimmerman's failure to object to the trial court's jury charge definitions of "intentional" and "knowingly" as allegedly being applicable to the "nature" of the applicant's conduct rather than the "result" of the applicant's conduct, especially in light of the diabetes and alleged, possible hypoglycemia evidence; defense counsel's alleged unilateral decision to forego the applicant's alleged hypoglycemia defense at either stage of the applicant's trial, allegedly denying the applicant his right to present his "version" of events; and, defense counsel Zimmerman's alleged failure to present the applicant's version of events or alleged failure to consult with the applicant about counsel's alleged unilateral decision not to proceed with the applicant's hypoglycemia defense.

2. Defense counsel's strategic decisions, made before, during, and after the applicant's trial, were reasonable and plausible; thus, such strategy decisions are not subject to appellate review. **Ex parte Ewing**, 549 S.W.2d 392 (Tex. Crim. App. 1977).

3. The applicant fails to show ineffective assistance of counsel based on either the standard set forth by the Court of Criminal Appeals in **Ex parte Duffy**, 607 S.W.2d 507 (Tex. Crim. App. 1980), or by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052 (1984). Defense counsel rendered reasonably effective assistance of counsel. Moreover, the applicant fails to show that counsel's performance was deficient and that such deficiency, if any, prejudiced the applicant so that he was denied a fair trial.

4. The applicant fails to show that his constitutional rights were violated pursuant to either the Texas Constitution or the United States Constitution.

5. The applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT CONCLUSIONS OF LAW IN CAUSE NO. CR-85-12B-I AND ENTERS SUCH FINDING AS WELL AS ANY ADDITIONAL FINDINGS NOTED BY THE COURT.

SIGNED this 3rd day of June, 1998.

/s/ Jack Robison
JACK ROBISON
Presiding Judge
207th District Court
Comal County, Texas

ORDER DESIGNATING RECORD

SIGNED JUNE 3, 1998

NO. CR-85-12B-1

EX PARTE	§	IN THE 207TH DISTRICT COURT
DAVID ISADOR PORT	§	OF
	§	COMAL COUNTY, TEXAS

ORDER

The Court has considered the applicant's pleadings, including the application for writ of habeas corpus, the Respondent's answer, the exhibits, the affidavits filed in the above-captioned case, the evidence elicited during the August, 1997 writ evidentiary hearing, and official court records in the above-captioned cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require any further evidentiary hearings and recommends that habeas relief be **DENIED**.

THE CLERK IS **ORDERED** to prepare a transcript and transmit same to the Court of Criminal Appeals as provided by **Tex. Code Crim. Proc. Ann.** art. 11.07 (Vernon Supp. 1996). The transcript shall include certified copies of the following documents:

1. the application for writ of habeas corpus in cause no. CR-85-12B-1;
2. any other pleadings filed by the applicant in cause no. CR-85-12B-1;
3. the Respondent's answer in cause no. CR-85-12B-1;
4. any other pleadings filed by the Respondent in cause no. CR-85-12B-1;
5. all affidavits filed in cause no. CR-85-12B-1;

6. the statement of facts, including all exhibits, of the writ evidentiary hearing held in cause no. CR-85-12B-1 on August 28 and August 29, 1997 in the 207th District Court of Comal County, Texas;

7. the applicant's proposed findings of fact and conclusions of law submitted in cause no. CR-85-12B-1;

8. the Respondent's proposed findings of fact and conclusions of law submitted in cause no. CR-85-12B-1;

9. the Court's findings of fact and conclusions of law entered in cause no. CR-85-12B-1;

10. the Court's order in cause no. CR-85-12B-1;

11. the appellate record from the applicant's trial in the instant case (unless it has been sent previously to the Court of Criminal Appeals pursuant to a postconviction writ order);

12. the indictment, judgment and sentence, and docket sheets from the applicant's trial in the instant case (unless they have been sent previously to the Court of Criminal Appeals pursuant to a postconviction writ order); and,

13. the appellate opinions in the applicant's case: **Port v. State,** 736 S.W.2d 865 (Tex. App. – Austin 1987); **Port v. State,** 738 S.W.2d 787 (Tex. App. – Austin 1987); and **Port v. State,** 798 S.W.2d 839 (Tex. App. – Austin 1990).

THE CLERK is further **ORDERED** to send a copy of this order to applicant's counsel: Mr. David Botsford;

1307 West Avenue; Austin, Texas 78701 and to Respondent: Roe Wilson and Baldwin Chin; Harris County District Attorney's Office; 201 Fannin; Houston, Texas 77002-1919.

SIGNED this 3rd day of June, 1998.

/s/ Jack Robison
JACK ROBISON
Presiding Judge
207TH District Court
Comal County, Texas